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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1058

MIDLAND COOPERATIVE WHOLESALE, PETITIONER

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF INTERIOR, AND H. A. GRAY, DIRECTOR THEREOF, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 141–170) has not yet been published. The opinion of the Director of the Bituminous Coal Division appears in the Record at pages 114–121.

JURISDICTION

The decree below was entered on January 27, 1942 (R. 170–171). The petition for a writ of certiorari was filed on March 20, 1942. The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 6 (b) of the Bituminous Coal Act of 1937, c. 127, 50 Stat. 85, 15 U. S. C., sec. 836 (b).

QUESTIONS PRESENTED

1. Whether the Director was correct in holding that a consumers cooperative is not entitled to discounts from the minimum prices as a "distributor" under the Bituminous Coal Act of 1937.

2. Although we do not believe that any such question need be decided,[1] petitioner also claims that the case involves the question whether the intrastate payment or use of patronage dividends based upon savings from interstate purchases is a practice in or directly affecting interstate commerce in coal.

STATUTE INVOLVED

The statute involved is the Bituminous Coal Act of 1937, c. 127, 50 Stat. 72–90, 15 U. S. C., secs. 828–851, extended April 11, 1941, Pub., No. 34, 77th Cong., 1st Sess.[2] The provisions of the Act primarily involved here are:

> SECTION 4 II (h). The Commission shall, by order, prescribe due and reasonable

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[1] See p. 15, *infra*.

[2] The Act, as initially passed, was to be administered by the National Bituminous Coal Commission. However, by the terms of the Executive Order (Reorganization Plan No. II, submitted by the President to the Congress on May 9, 1939, Sections 4 (a) and (b), effective July 1, 1939, Pub. Res. No. 20, 76th Cong., 1st Session, c. 193, approved June 7,

maximum discounts or price allowances that may be made by code members to persons (whether or not code members), herein referred to as "distributors", who purchase coal for resale and resell it in not less than cargo or railroad carload lots; and shall require the maintenance and observance by such persons, in the resale of such coal, of the prices and marketing rules and regulations established under this section.

SECTION 4 II (i). The following practices with respect to coal shall be unfair methods of competition and shall constitute violations of the code:

* * * * *

12. Selling to, or through, any broker, jobber, commission account, or sales agency, which is in fact or in effect an agency or an instrumentality of a retailer or an industrial consumer or of an organization of retailers or industrial consumers, whereby they are [or] any of them secure either directly or indirectly a discount, dividend, allowance, or rebates, or a price other than that determined in the manner prescribed by this Act.

13. * * * It shall not be an unfair method of competition or a violation of the

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1939), made pursuant to authority granted in the Reorganization Act of 1939 (Pub., No. 19, 76th Cong., 1st Sess., approved April 3, 1939, c. 36, 53 Stat. 561, 5 U. S. C., sec. 133) the functions of the Commission were transferred to the Department of the Interior and the Act is now being administered by the Bituminous Coal Division of the Department of the Interior, hereinafter referred to as the "Division."

code or any requirement of this Act (1) to sell to or through any bona-fide and legitimate farmers' cooperative organization duly organized under the laws of any State, Territory, the District of Columbia, or the United States whether or not such organization grants rebates, discounts, patronage dividends, or other similar benefits to its members; (2) to sell through any intervening agency to any such cooperative organization; or (3) to pay or allow to any such cooperative organization or to any such intervening agency any discount, commission, rebate, or dividend ordinarily paid or allowed, or permitted by the code to be paid or allowed, to other purchasers for purchases in wholesale or middleman quantities.

STATEMENT

The essential facts here are not disputed.[3] Midland Cooperative Wholesale, petitioner, is a nonprofit wholesale cooperative organized in 1926 under the laws of Minnesota (R. 7, 91, 102). It is owned by approximately 200 retail cooperative associations operating in Minnesota, Wisconsin, Iowa, and South Dakota (R. 40–41). Those retail associations are composed of approximately 110,000 individual members of whom over 85 percent are farmers. All these constituent associations are not farmers' cooperatives, many falling

[3] A more detailed statement of facts is found in the Director's Findings of May 22, 1941 (R. 116–121), with which petitioner does not take issue.

within the category of consumers' cooperatives (R. 40–41). Midland serves in the capacity of a wholesaler to (or purchasing agent for) its member cooperative associations, supplying them with many types of commodities (R. 133). Since 1934 Midland has been supplying bituminous coal to about 45 of its constituent retail associations (R. 68). The coal purchased by petitioner is purchased chiefly from mines operating in West Virginia and eastern Kentucky and shipped to the retail associations by rail or lake (R. 71). Petitioner's annual sales to its retail associations have amounted to about 600 carloads or about 24,000 tons of coal (R. 90). All coal handled by Midland is purchased for resale and is resold in not less than cargo or railroad carload lots (R. 47).

Under the Minnesota Law (R. 102)[4] and its Bylaws (R. 129–130), petitioner is required annually to distribute its "undivided surplus" or "net income" on the basis of patronage. Patronage dividends are distributed to each constituent retail association on the basis of gross operating margins on the total quantity of each major commodity purchased by it; a portion is left with petitioner as loan capital (R. 25, 103).

On December 9, 1940, petitioner filed an application (R. 7, 115), pursuant to Section 304.11 of the Rules and Regulations for Registration of Distributors, seeking permission to register as a dis-

[4] Exhibit 2, not printed (R. 43, 139).

tributor within the meaning of Section 4 II (h) of the Act.

After a hearing (R. 35–101) and waiver of an examiner's report (R. 99–100, 116), Director Howard A. Gray of the Bituminous Coal Division on May 22, 1941, made and entered his Findings of Fact and Conclusions of Law (R. 116–121). He found that petitioner did not come within the exception for "bona fide and legitimate farmers' cooperative organizations" contained in Section 4 II (i) 13, and that petitioner could not qualify as a "distributor" because the benefits of any discounts would accrue to the ultimate consumer in violation of Section 4 II (i) 12 (R. 120–121). The Director concluded, however, that petitioner could qualify as an "intervening agency" pursuant to paragraph 13 of Section 4 II (i) in connection with that portion of the coal which was resold to bona fide and legitimate farmers' cooperatives.

To that end the Director entered an order (R. 115), as follows:

> It Is Ordered That petitioner, Midland Wholesale Cooperative may qualify as an intervening agency under paragraph 13 of Section 4 II (i) of the Act, for all sales of coal in not less than cargo or railroad carload lots to retail associations which are bona fide and legitimate farmers' cooperative organizations, in the following manner.
>
> (a) By certifying to the Bituminous Coal Division, under oath, the names of all its

retail associations which are bona fide and legitimate farmers' cooperative organizations duly organized under the laws of the state in which they are incorporated;

(b) By agreeing, under oath, that it will not accept or retain any discount, price allowance or commission on any bituminous coal which it purchases for resale to others than the bona fide and legitimate farmers' cooperative organizations whose names are filed with the Division.

On July 19, 1941, petitioner filed in the Circuit Court of Appeals for the Eighth Circuit a petition to review this order (R. 1–2). On January 27, 1942, the Circuit Court of Appeals affirmed the Director's order (R. 141–170).

ARGUMENT

1. Section 4 II (e) of the Bituminous Coal Act prohibits the sales of coal below the minimum prices established. Section 4 II (h) provides that the Commission shall prescribe reasonable maximum discounts for persons "herein referred to as 'distributors,' who purchase coal for resale and resell it in not less than cargo or railroad carload lots," and shall require such persons to observe the "prices and marketing rules and regulations" established under the Act.

The position of a distributor in the marketing process is substantially the same as that of a producer's own selling organization or outside sales agency, in that he performs a selling service for

the producer.[5] Accordingly, although he trades independently rather than on commission, the distributor is deemed to be entitled, by way of discount, to a share of the producer's price. This reason for allowing a discount to distributors has no application to persons who act as agents for the purchaser. On the contrary, the allowance of discounts to the latter would impair the effectiveness of the basic statutory objective of requiring all purchasers to pay the established minimum prices. Section 4 II (i) 12 shows that Congress did not

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[5] The function of the distributor as wholesale marketer for the producer is described in the Findings of Fact of the Director of the Bituminous Coal Division in *In the Matter of Prescribing Due and Reasonable Maximum Discounts or Price Allowances by Code Members to "Distributors,"* General Docket No. 12, pages 4–7, as follows:

"Producers of bituminous coal market their coals in three general ways: (1) through their own sales organizations, (2) through sales agents, and (3) through distributors. Indeed, it is almost always true that any given producer does not market all of his coal through any one channel. Instead, he generally markets part of his production through his own sales organization, another part through a sales agent, and still another part through distributors. * * *"

* * * * *

"* * * The ordinary and usual method by which a distributor conducts his business is to acquaint himself with the prices at which he could probably purchase coal at the mines and then to seek a buyer or buyers for such coal at prices that would give him a profit. Thus, before attempting to sell the coal, he obtains reasonable assurance of his ability to buy it at a price below the current market price. Once orders are secured by him, he purchases the coal at the prices previously ascertained to be available, or canvasses for still lower prices. The prices at which he has purchased the coal

intend the distributors' discount to be available to agents of the purchaser. Under that section the Code is violated by

> 12. Selling to, or through, any broker, jobber, commission account, or sales agency, which is in fact or in effect an agency or an instrumentality of a retailer or an industrial consumer or of an organization of retailers or industrial consumers, whereby they are [or] any of them secure either directly or indirectly a discount, dividend, allowance, or rebates, or a price other than that determined in the manner prescribed by this Act.

Petitioner, concededly a "purchasing agent for" its members (Pet. p. 3), is an "agency" of an "organization of retailers" whereby the latter may "secure directly or indirectly" a "discount" or "dividend" on the price of coal, within the meaning of the above paragraph.

That Congress considered and determined the extent to which the above statutory provisions

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have generally been the current market prices less a discount on account of the prospective resale. * * *"

* * * * *

"* * * in certain areas, rather than maintain selling organizations, producers and sales agents frequently sell some of their coal to distributors, for the reason that the volume of such producer's or sales agent's tonnage sold therein is insufficient to warrant the expense incident to the maintenance of a sales organization. The distributors to whom such coal is sold are usually either other producers or sales agents for other coal producers, or for the producers of other commodities, whose sales volume in these areas warrants the maintenance of selling organizations therein. * * *"

should apply to cooperative organizations appears plainly from the second paragraph of Section 4 II (i) 13. That paragraph provides that the Act shall not be violated by sales to "any bona-fide and legitimate farmers' cooperative organization" by sales "through any intervening agency to any such cooperative organization" or by paying or allowing any such organization or "any such intervening agency any discount, commission, rebate, or dividend ordinarily paid or allowed * * * to other purchasers for purchases in wholesale or middleman quantities." This paragraph demonstrates clearly, as both the Director and the lower court found, that Congress intended farmers' cooperatives to be exempt from the restrictive provisions imposed on purchasers and their agents by Section 4 II (i) 12. The last clause, in particular, shows that Congress intended the equivalent of a distributor's discount to be available to an agency purchasing on behalf of a farmers' cooperative. The presence of this specific exception limited to farmers' cooperatives indicates that other purchasers, including other types of cooperative organizations, were not to be exempt. *Expressio unius est exclusio alterius. Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 22.

Petitioner claims that the paragraph does not constitute an "exception" or "exemption" for farmers' cooperatives, but that it is "merely an interpreting or clarifying provision for the purpose

of preventing misunderstanding" (Pet. pp. 22–23); it is contended that, entirely apart from paragraph 13, cooperatives, whether for farmers or consumers, are not subject to paragraph 12 of Section 4 II (i). This forced interpretation would make paragraph 13 unnecessary, and is hardly consistent with the restriction of the paragraph to farmers' cooperatives alone. If Congress intended that consumer or other cooperatives be given the same advantages as agricultural cooperatives it would undoubtedly have said so. The courts have frequently held that such phrases as "farmers' cooperative" are not to be construed as including other types of cooperative organizations.[6] And the reference in some federal statutes to farmers' cooperatives[7] and in others to cooperative organizations generally[8] or to consumers' coopera-

[6] E. g., *Garden Homes Co.* v. *Commissioner*, 64 F. (2d) 593, 596 (C. C. A. 7, 1933); *Sunset Scavenger Co.* v. *Commissioner*, 84 F. (2d) 453, 455 (C. C. A. 9, 1936); *National Outdoor Advertising Bureau* v. *Helvering*, 89 F. (2d) 878, 880 (C. C. A. 2, 1937); *Co-operative Central Exchange* v. *Commissioner*, 27 B. T. A. 17 (1932).

[7] Section 6 of the Clayton Act (c. 323, 38 Stat. 731, 15 U. S. C., sec. 17); Section 1 of the Capper-Volstead Act (c. 57, 42 Stat. 388, 7 U. S. C., sec. 291); the Agricultural Credit Act of 1913 (c. 252, 42 Stat. 1479, 12 U. S. C., sec. 351); Section 15 (a) of the Agricultural Marketing Act (c. 164, 49 Stat. 317, 12 U. S. C., sec. 1141 (j)); Section 203 (b) of the Motor Carrier Act (c. 498, 49 Stat. 544, 49 U. S. C., sec. 303 (b)); and Section 3 (a) (5) of the Securities Act of 1933 (c. 38, 48 Stat. 75, 15 U. S. C., sec. 77 (c)).

[8] Section 4 of the Robinson-Patman Act (c. 592, 49 Stat. 1528, 15 U. S. C., sec. 13b). That section 4 of the Robinson-

tives alone[9] demonstrates that Congress is fully conscious of the difference between the types of cooperatives and able to discriminate between them.

That consumer cooperatives were deliberately omitted from paragraph 13 appears from the legislative history set forth in detail in the opinion of the court below (R. 151–160). In summary, it is sufficient to say that an unsuccessful attempt was made when the first coal act was adopted in 1935 to enlarge the present paragraph 13 so as to make it applicable to consumer cooperatives (see R. 153–155), and that when the present Act was passed in 1937 the question of whether farm or consumer cooperative organizations should be entitled to special treatment was debated before the present, limited paragraph 13 was again included in the statute (see R. 155–157). Furthermore, when the present Act was extended in 1941, after committee hearings at which a large amount of testimony, including that of petitioner's general manager, was taken on this very subject, both House and Senate Committees declined to recommend a proposed amendment which would have brought consumer cooperatives within paragraph 13 (see R. 157–160).

Patman Act was intended to encompass consumer cooperatives as well as farmers' cooperatives is clear. See H. Rep. 2287, 74th Cong., 2d Sess., Part I, p. 17, and Part II, pp. 18–19; H. Rep. 2951, 74th Cong., 2d Sess.

[9] District of Columbia Cooperative Association Act (c. 397, 54 Stat. 480).

The Senate committee report stated (S. Rep. No. 169, p. 3, 77th Cong., 1st sess.)

> The testimony also showed that any amendment designed to allow discounts to wholesale consumer cooperatives might destroy established wholesale and retail coal dealers and provide industrial consumers with a means of evading the basic provisions of the act. More experience in the administration of the act and more detailed consideration than is possible in advance of the expiration of the act are necessary before the committee can recommend such legislation, if any, as is necessary to deal with these problems.

See to the same effect H. Rep. No. 324, p. 8, 77th Cong., 1st sess. The amendment rejected by the committees, which would have expressly permitted consumer cooperatives to obtain distributors' discounts, was subsequently offered, debated, and defeated on the floor of the House (87 Cong. Rec. 2664–2665, and withdrawn after debate on the floor of the Senate (87 Cong. Rec. 3039). In view of this legislative history it is plain that petitioner is seeking to have this Court read into the statute the substance of what Congress has repeatedly rejected.

Petitioner claims (Pet. pp. 19–21) that the decision below is in conflict with *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. (2d) 393, 399–400 (C. C. A. 1). That case held that Sec-

tion 4 of the Robinson-Patman Act (c. 592, 49 Stat. 1528, 15 U. S. C., Sec. 13b), which expressly exempts patronage dividends from the operation of that statute, did *not* exempt purchasing cooperatives from the prohibition in Section 2 (c) (15 U. S. C. Sec. 13 (c)) against the receipt of discounts from the seller of the commodity.[10] Except for the indication that exemptions for cooperatives are to be strictly construed, the case has no pertinence here.

2. Petitioner contends (Pet. p. 24) that the decision below conflicts with *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, and *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469. The claim apparently is that petitioner's practices in refunding or allocating patronage dividends occur entirely within one state and thus are not in or directly affecting interstate commerce. Petitioner purchases its coal from producers in West Virginia and Kentucky (R. 71) and distributes the coal throughout four midwestern states (R. 40–41). If a patronage dividend is based upon the price paid for coal sold in interstate commerce, it is intrinsically related to the interstate sale, irrespective of whether the dividend itself crosses state lines. Cf. *United States* v. *Ferger*, 250 U. S. 199; *Currin* v. *Wallace*, 306

[10] The court assumed, for purposes of its decision, that petitioner in the *Quality Bakers* case was a cooperative organization. 114 F. (2d) at 399–400. The Federal Trade Commission had decided to the contrary (*id.*, at p. 397).

U. S. 1; *United States* v. *Wrightwood Dairy Co., Inc.,* Nos. 744, 783, present Term, decided February 2, 1942. No federal regulation of interstate prices or rates could be effective if a rebate on the interstate price could go unpunished if so contrived as not to cross a state border. Cf. *Union Pacific Co.* v. *United States,* 313 U. S. 450, 464; *United States* v. *Union Stock Yard,* 226 U. S. 286, 308; *Swift & Co.* v. *Wallace,* 105 F. (2d) 848, 861 (C. C. A. 7).

In any event, the record does not present the question which petitioner seeks to raise, and the Court would not be required to pass upon it. The Director held that petitioner was not entitled to the distributor's discount on its purchases, not that petitioner could not distribute patronage dividends. The discount on the purchase price of coal shipped interstate is plainly an integral part of the interstate price. Furthermore, since petitioner's members are located in four states, petitioner cannot properly assume, in the absence of specific supporting evidence, that the dividends paid are not themselves transmitted in interstate commerce. Finally, petitioner may not raise the point since the objection was not urged before the Commission (cf. R. 108–113, 167n). Section 6 (b) of the Act provides, *inter alia,* that "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below."

3. Petitioner asserts (Pet. pp. 13–14) that the Director's order is "self-conflicting." The order (R. 114–115) indicates that petitioner will be permitted to obtain distributor's discounts for coal resold to those of its members which are bonda fide and legitimate farmers' cooperatives. In order to insure compliance with the statutory provision prohibiting discounts to agents of purchasers other than farmers' cooperatives, petitioner was required to agree not to accept such discounts on coal to be sold to others. The order thus gives effect to all of the pertinent statutory provisions, and contains no inconsistency.

4. Despite petitioner's claim to the contrary (Pet. pp. 12–13), this case does not involve the status of patronage dividends under "various federal laws," "war orders which are being issued to control prices," or state "Fair Trade Acts." The decision below properly rested upon the language, purposes and legislative history of the Bituminous Coal Act. The Director was not called upon to, and did not, hold that the payment of patronage dividends on coal to consumer members was generally unlawful, or was even in violation of the Coal Act except where the cooperative obtained the coal at a discount from the minimum price. His decision was only that petitioner was not entitled to a special discount from the minimum prices paid producers on coal resold to such members. This is concededly (Pet. p. 12) the only case in which the point has been raised.

CONCLUSION

There exists no conflict of decisions. The decision below is plainly correct. Accordingly, the petition for certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
ROBERT L. STERN,
Attorney.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior.
ARNOLD LEVY,
General Counsel,
WALTER FREEDMAN,
Attorney,
Bituminous Coal Division,
Department of the Interior.

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